United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

75-4171

In The

United States Court of Appeals

For The Second Circuit

GIUSEPPE MARINO,

Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

B

P/S

BRIEF AND APPENDIX FOR PETITIONER

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IN THE SECOND CIRCUIT

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GIUSEPPE MARINO,

Petitioner,

-against-

IMMIGRATION & NATURALIZATION SERVICE,
UNITED STATES DEPARTMENT OF JUSTICE,

Respondent.

- -x

BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

This petitioner seeks review of a decision of the Board of Immigration Appeals dated April 30, 1975, which denied the petitioner's application for permanent residence, made during his deportation proceedings, holding that he was an excludable alien having been convicted of a crime involving moral turpitude, and thereby found him deportable. The jurisdiction of this Court, in this matter is provided for under Public Law 87-301, 8 U.S.C. 1105(a).

PERTINENT PROVISIONS OF THE STATUTES INVOLVED

Section 212 of the Immigration and Nationality Act, (8 U.S.C. 1182), provides:

> "(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be

excluded from admission into the United States:
(9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), . . .

Any alien who would be excludable because of the conviction of a misdemeanor classifiable as a petty offense under the provisions of section 1(3) of title 18, United States Code, by reason of the punishment actually imposed, ...may be granted a visa and admitted to the United States if otherwise admissible...."

United States Code, Title 18, Section 1, provides:

"Offenses classified
Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor. . .

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

Article 642 of the Italian Penal Code, as translated by the Government, Exhibit #9A, provides:

"(Fraudulent destruction of one's property and fraudulent mutilation of one's own body).

Whoever, for the purpose of gaining for himself or others the premium of insurance against accidents, destroys, disperses, deteriorates, or hides objects of his own property, is punished with prison of six months to three years and with a fine up to 400,000 lire.

...If the perpetrating person carries out such intent, the penalty is increased."

Title 22 of the District of Columbia Code:

Chapter 4- ARSON

***

"Section 22-402. Burning one's own property with intent to defraud or injure another.

Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than fifteen years." (Emphasis supplied.)

"Section 22-403. Malicious burning, destruction, or injury of another's movable property.

Whoever maliciously injures or breaks or destrous or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his own, of the value of $200 or more, shall be fined not more than $5,000 or shall be imprisoned for not more than ten years, or both, and if the value of the property be less than $200 shall be fined not more than $1,000 or imprisoned for not more than one year, or both." (Emphasis supplied.)

ISSUES PRESENTED FOR REVIEW

I.

Whether, with respect to deportability, the guilty verdict under Article 642 or the Italian Penal Code constituted a conviction of a crime involving moral turpitude; and if so, should it be classified under the petty offense exception to the statute as a misdemeanor.

II.

Whether there was a conviction in view of the general amnesty which extinguished petitioner's pending appeal.

THE FACTS

The petitioner, Giuseppe Marino, was admitted to the United States as a non-immigrant for pleasure on October 4, 1971. On May 22, 1972 the Government commenced deportation proceedings against him as a visitor who had overstayed the period of time allotted to him. During the course of these deportation proceedings he made application for permanent residence under Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255), based on a previously approved visa petition filed by his sister, a citizen of the United States. He met all of the requirements except one: before coming to the United States, on December 6, 1962, he was found guilty in Ribera, Italy of violating Article 642 of the Italian Penal Code, by the local

police magistrate. Article 642 makes it a punishable crime to destroy disperse, deteriorate, or hide "objects of his own property..." "for the purpose of gaining for himself or others the premium of insurance against accidents."

Giuseppe Marino, who has consistently denied the charges brought against him, was then sentenced to a suspended six month sentence and fined 100,000 lira - according to the Board, this sum was the equivalent of about $160. At the time the decision was rendered he took an immediate appeal. During the pendancy of this appeal, a general presidential amnesty was declared on January 24, 1963, which included the petitioner. This had the effect of extinguishing his appeal. (Exhibits 7 and 7A, under Item #27 of the Administrative Record; see also Article 151 of the Italian Penal Code.)

On February 9, 1973 Immigration Judge Cohen held that the above Italian verdict constituted the conviction of a crime involving moral turpitude rendering him ineligible to receive a visa under Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9). He thereby denied the application for permanent residence and held that the petitioner was deportable. Further, it was held that the crime did not fall within the petty offense exception to the debarring provision as a misdemeanor since the pertinent provision of the Italian

Code "...appears to fall under (Title) 22-(Section) 402...", an arson provision of the District of Columbia Code, which provides for a maximum punishment of 15 years imprisonment. He refused to make comparison to any other section of the District Code.

On appeal before the Board of Immigration Appeals, in a decision rendered on April 30, 1975, the Board concurred with the immigration Judge, holding that:

> "Section 22-402 of the District of Columbia Code is the provision most nearly equivalent to the Italian statute under which the respondent was convicted." (Emphasis supplied.) (At page 4 of the Board's opinion; See Appendix).

The Italian record of conviction was introduced during the deportation hearing. (See: Exhibit 7 and 7A; Item #27 of the Administrative Record.) These exhibits were considered by both the Immigration Judge and the Board of Immigration Appeals. It includes not only the charge but the findings "In Fact and Law" made by the Italian police magistrate in arriving at his decision.

The petitioner, a tenant farmer, was "...accused of the crime under Art. 642 of the Penal Code, of having, in order to obtain for himself the disaster insurance involved, did destroy by means of fire, the roof of a farmhouse owned by Vito Lo Cascio rented by the defendant, in addition to an undetermined number of beehives owned by said defendant." (Emphasis supplied.)

The magistrate found, on the basis of a police investigation and testimony of a neighbor, that there was in fact, no beehives. The magistrate stated that it was "made precisely clear that Marino could not have possessed such beehives."

The magistrate, in find the petitioner guilty, concluded that "...in view of the evidence, there emerged the complete non-existence of the damages claimed by the defendant."

ARGUMENT

POINT I

BOTH THE IMMIGRATION JUDGE WHO PRESIDED OVER THE DEPORTATION PROCEEDINGS AND THE BOARD OF IMMIGRATION APPEALS CLEARLY ERRED WHEN THEY INSISTED ON EQUATING ARTICLE 642 OF THE ITALIAN PENAL CODE WITH TITLE 22, SECTION 402, AN ARSON PROVISION OF THE DISTRICT OF COLUMBIA CODE.

Traditionally, the courts have held that deportation statutes must be strictly construed. Rosenbert v. Fleuti, 374 U.S. 449 (1963); Bonetti v. Rogers, 356 U.S. 691 (1958); Costello v. INS, 376 U.S. 120 (1964).

This Court recently confirmed this principle in Lennon v. INS, Docket No. 74-2189 (2 Cir., decided October 7, 1975). Lennon who, like this applicant, had made application for permanent residence during his deportation proceedings, had been

held to be ineligible to receive a visa as being excludable because of a foreign narcotics conviction, Section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(3). In reversing the Board this Court stated at page 150:

> "...It is settled doctrine that deportation statutes must be construed in favor of the alien.
>
> '(S)ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).'"

The issues in the instant case must be resolved by the rules of statutory construction. It is contended that neither the Immigration Judge who conducted the deportation proceedings nor the Board of Immigration Appeals who reviewed his decision gave this petitioner a proper construction of the statutes involved, considering they converted a minor violation of the Italian law involving a six month suspended sentence and a $160. fine into what amounts to an arson conviction under the District of Columbia Code, a crime whose maximum punishment is fifteen (15) years imprisonment.

In determining whether a foreign crime falls within the petty offense exception to Section 241(a)(9), i.e., as a misdemeanor, "any offense other than one punishable by death or

imprisonment for a term exceeding one year", reference is made first to Title 18 of the United States Code in search of an equivalent crime. Failing this, reference is then made to Title 22 of the District of Columbia Code.

In following this formula as authorized by Giammario v. Hurney, 311 F.2d 285 (3 Cir. 1962) in the instant case, the Board said:

> "There is no crime equivalent to Article 642 in Title 18 of the United States Code. We agree with the Immigration Judge that section 22-402 of the District of Columbia Code is the provision most nearly equivalent to the Italian statute under which the respondent was convicted." (At page 4 of the Board's decision; emphasis supplied.)

Section 22-402 is one of the provisions of the arson statute of the District Code. By no stretch of the imagination is Article 642 of the Italian Penal Code an arson provision. The Italian statute does not mention burning. Italy does have a statute making arson a crime. See Article 423 of the Italian Penal Code. If it had been the purpose to punish this petitioner for arson he could have been prosecuted under that provision.

Section 22-402 of the District of Columbia Code provides that "Whoever maliciously burns or sets fire to any dwelling, shop, barn..., the same being his own property, ...shall be imprisioned for not more than fifteen years." (Emphasis supplied).

Ownership is an essential element of this crime, as recognized by the courts of the District of Columbia. See: Killens v. U.S., 263 A.2d 44 (DCA 1970), and Gurley v. U.S., 308 A.2d 785 (DCA 1973), as concerns the succeeding section, 22-403, to be discussed infra.

The Italian record of conviction, made a part of the record below, as Exhibits 7 and 7A (#27 in the Administrative Record) and considered by both the Immigration Judge and the Board of Immigration Appeals contains not only the charge but certain findings "In Fact and Law" made by the police magistrate in arriving at his decision.

From this record it appears that this petitioner, a tenant farmer, reported a fire to the police, claiming the loss of certain insured beehives. He was subsequently charged with a violation of 642 of the Italian Penal Code:

> "Whoever, for the purpose of gaining for himself or others the premium of insurance accidents...destroys...objects of his own property, is punished with prison of six months to three years and with a fine of up to 400,000 lire."

He was specifically charged with destroying "by means of fire, the roof of a farmhouse owned by Vito Lo Cascio and rented by the defendant, in addition to an undetermined number of beehives owned by said defendant."

In finding the petitioner guilty of the charge, the record

shows that the magistrate predicated this conclusion entirely on the fact that there were no beehives: "...there emerged the complete non-existence of the damages claimed by the defendant." (At page 2 of the record of conviction.)

Therefore, Section 22-402, which proscribes the malicious burning of one's own property is not applicable here.

In fact, it would seem that the guilty verdict contravened the Italian statute and the charge drawn therefrom also, since that statute proscribes the destruction "of his own property." This is particularly frustrating since his pending appeal was extinguished by a general amnesty. However, a conviction void on its face under the law of the local jurisdiction can be disregarded for immigration purposes. Wilson v. Carr, 41 F.2d 704 (5 Cir. 1930); Freislinger v. Smith, 41 F.2d 707 (7 Cir. 1930).

As indicated, Section 22-402 makes it a crime to burn one's own property. The succeeding section, 22-403 provides that:

> "Whoever maliciously injures or breaks or destroys...by fire or otherwise...property...not his own...shall be fined not more than $5,000 or shall be imprisioned for not more than ten years, or both, and if the value of the property be less than $200 shall be fined not more than $1000 or imprisoned for not more than one year, or both."

The latter provision would constitute a misdemeanor, placing the petitioner within the petty offense exception to the statute.

It is not clear from the record of conviction what the exact damages were. The police magistrate referred to "approximately 150,000 liras." Where there is an ambiguity, it should be resolved in the petitioner's favor. Lennon v. INS, supra. Certainly where there is a choice between a felony and a misdemeanor, petitioner should receive the benefit of the doubt.

This petitioner was never charged with the specific charge of the crime of arson. That was not the gravamen of the charge. Certainly he was not guilty of fraud because the crime was never consumated. He never received anything of value. This was merely a scheme or an attempt to do something. A closer analogy to the District Code would be a violation of attempting to obtain money under false pretenses, a misdemeanor. The offense of false pretenses is defined in Section 22-1301 of the District Code and attempts to commit crimes are covered by Section 22-103. See: Cooper v. U.S., 123 A.2d 918. (Prosecution for attempting by false pretenses to obtain money from an insurance company on a fraudulent claim for stolen furs.)

Then too, since the Italian proceedings were a police matter involving an alleged false report to them, a closer equivalent might be covered by Title 4-150a of the District Code, which makes it a crime to make a false or fictitious report to the police, the maximum punishment for which is a $300 fine and imprisonment for 30 days.

POINT II

THE EXTINGUISHED APPEAL DEPRIVED THE ITALIAN GUILTY VERDICT OF THAT FINALITY NEEDED TO CONSTITUTE A CONVICTION WITHIN THE MEANING OF THE STATUTE.

This petitioner took an immediate appeal at the time the guilty decision was rendered on December 6, 1962. However, before his appeal could be heard he became the subject of an unsolicited general amnesty, the "Presidential Decree of Amnesty of January 24, 1963, for which reason (the appeal) must be declared extinguished." (Part of Exhibits 7 & 7A of the Record). Article 151 of the Italian Penal Code provides for automatic extinction of the offense when an amnesty is granted.

The Board has long held that foreign amnesties may be ignored for purposes of deportation, citing U.S. v. Smith, 17 F.2d 534, (2 Cir. 1927).

But there is more here than just an amnesty. The amnesty had the effect of depriving the petitioner of his right to appeal.

In Pino v. Landon, 215 F.2d 237 (1 Cir. 1954), the alien's case was put "on file", apparently in perpetuity. The court, while recognizing the principle that collateral judicial action normally awaits appellate renew before the proceedings could be considered final, held that the Government, was not required to "wait forever."

The Supreme Court in reversing, in a per curiam opinion, stated:

> "On the record here we are unable to say that the conviction has attained such finality as to support an order of deportation within the contemplation of Sec. 241 of the Immigration and Nationality Act. The judgment is reversed." 349 U.S. 901 (1955).

See also Will v. INS, (7 Cir. 1971), involving an appeal from a narcotics "conviction", in which the Pino case is discussed.

It is evident that the right of appeal is extremely important in Italy and the United States, in administrative and judicial proceedings. For example, see In Re Ming, 469 F.2d 1352 (7 Cir. 1972), attorney disbarred during the pendancy of his appeal from conviction.

In the instant case the petitioner was completely deprived of his right to appeal, by the general amnesty which exonerated him. Under the circumstances can it be said that his Italian "conviction" was of sufficient finality to serve as the basis for his deportation?

CONCLUSION

WHEREFORE, it is respectfully requested that this Court rule that the decision of the Board of Immigration Appeals holding the petitioner deportable is in error thereby permitting the petitioner to successfully proceed with his application for permanent residence.

Respectfully submitted,

THOMAS A. CHURCH
Attorney for Petitioner

ORDER TO BE REVIEWED

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

File: A19 499 685 - New York Apr 30, 1975

In re: GUISEPPE MARINO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Mario M. De Optatis, Esquire
253 Broadway
New York, New York 10007

ON BEHALF OF I&N SERVICE: Irving A. Appleman
Appellate Trial Attorney

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant visitor - remained longer

APPLICATION: Adjustment of status pursuant to section 245, Immigration and Nationality Act; or, in the alternative, voluntary departure

This is an appeal from the January 30, 1973 decision of the immigration judge, made at a reopened hearing, in which he reaffirmed an earlier decision finding the respondent deportable, denied the respondent's application for adjustment of status on the ground that he was excludable under section 212(a)(9) of the

Order to be Reviewed

Immigration and Nationality Act as a person who had been convicted of a crime involving moral turpitude, and regranted the privilege of voluntary departure. We agree with the immigration judge's excellent opinion; the appeal will be dismissed.

The respondent, a native and citizen of Italy, has applied for adjustment of status on the basis of an approved fifth preference visa petition filed on his behalf by his sister. Standing in the way are the following facts. On December 6, 1962 the respondent was convicted in Italy under Article 642, Italian Penal Code, of fraudulent destruction of his own property. 1/ He was sentenced to six months in prison and a fine of 100,000 lire, the equivalent of $160 at that time; the sentence was suspended for five years. He appealed the judgment on the day it was rendered. However, on March 8, 1963 the Italian court declared it "unnecessary to proceed . . .[with the appeal] by reason of the extinction of said crime following amnesty." (Ex. 7.)

On appeal counsel contends that the conviction on the basis of which the respondent has been found ineligible for adjustment

1/ Whoever, for the purpose of gaining for himself or others the premium of an insurance against accidents, destroys, disperses, deteriorates or hides objects of his own property, is punished with prison of six months to three years and with a fine up to 400,000 lire. . . . (Ex. 9A translation.)

of status lacks the requisite finality, because a direct appeal from the conviction was pending when a presidential decree of amnesty extinguished the crime, cutting off the respondent's opportunity to vindicate himself on appeal. He states that the right to appeal a conviction is a basic right, and he cites several New York State cases and Will v. Ins., 447 F.2d 529 (7 Cir. 1971). In Will the court held that as long as a direct appeal was pending from the alien's conviction, the alien had not been "convicted" with the requisite finality to support deportation. Counsel further asserts that even if there was a final conviction, the comparable crime in the United States is a misdemeanor classifiable as a petty offense and therefore an exception to section 212(a)(9) of the Act.

It has often been held that a foreign amnesty or pardon is ineffective to prevent exclusion or deportation. U.S. ex rel. Palermo v. Smith, 17 F.2d 534, 535 (2 Cir. 1927); Matter of Adamo, 10 I&N Dec. 593 (BIA 1964); Matter of B-, 7 I&N Dec. 155 (BIA 1956); Matter of M-, 9 I&N Dec. 132, 134 (BIA 1960); Matter of G-, 5 I&N Dec. 129 (BIA 1953). Moreover, in Will v. Ins., supra, the conviction, the finality of which was in issue, was the basis for the finding of deportability. The burden was on the Immigration and Naturalization Service to prove deportability by

clear, convincing, and unequivocal evidence. Woodby v. INS, 385 U.S. 276 (1966). In the instant case, however, deportability is conceded. The question of the finality of the conviction has arisen in the context of an application for adjustment of status. An applicant for adjustment of status bears the burden of proving that he is eligible for such relief and that discretion should be exercised in his behalf. 8 C.F.R. 242.17(d); Cabrera v. INS, 415 F.2d 1096 (9 Cir. 1969); Montemurro v. INS, 409 F.2d 832 (9 Cir. 1969). The respondent's appeal is no longer pending. His conviction appears to us to be final; he has not proven to us that it was not. Furthermore, even if, as counsel contends, the Italian procedure of dismissing pending appeals upon the granting of amnesty deprives persons such as the respondent of rights that are considered basic in American law, there is no requirement that a foreign conviction must conform to rights guaranteed by statute in the United States. Cf. Matter of Gutierrez, Interim Decision 2234 (BIA 1973); Matter of M-, supra. We agree with the immigration judge that the respondent's conviction was final for immigration purposes.

Counsel maintains that in determining whether the crime in question was a felony or a misdemeanor, the immigration judge erred in his choice of an equivalent United States crime. The

Order to be Reviewed

immigration judge found Article 642 of the Italian Penal Code to be most comparable with District of Columbia Code 22-402 (not 22-401, as counsel erroneously asserts), burning one's own property with intent to defraud or injure another. 2/ Counsel compares the crime with the New York crime of reckless endangerment of property.

To determine whether a crime committed in a foreign country should be classified as a felony or a misdemeanor, the offense is examined in the light of the maximum punishment imposable for an equivalent crime described in Title 18 of the United States Code or, if an equivalent offense is not found there, Title 22 of the District of Columbia Code. Giammario v. Hurney, 311 F.2d 285 (3 Cir. 1962); Matter of Grazley, Interim Decision 2194 (BIA 1973); Matter of T-, 6 I&N Dec. 508, 517 (A.G. 1955). A misdemeanor is any offense other than one punishable by death or by imprisonment for a term exceeding one year. 18 U.S.C. sections (1), (2).

There is no crime equivalent to Article 642 in Title 18 of the United States Code. We agree with the immigration judge

2/ Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than fifteen years.

Order to be Reviewed

that section 22-402 of the District of Columbia Code is the provision most nearly equivalent to the Italian statute under which the respondent was convicted. It is clearly a felony, carrying a maximum penalty of 15 years in prison. It differs from the Italian statute mainly in that (1) it covers destruction by fire only and not by any other means, while the Italian provision does not mention the means of destruction; and (2) it makes no specific mention of insurance. However, there is nothing on the face of the statute to indicate that it would not be applied in a situation where the property was burned so that the perpetrator could collect the insurance. Since the respondent was convicted of a crime involving moral turpitude which was a felony, the petty offense exception to setion 212(a)(9) of the Act is not available to him.

We find counsel's other contentions to be without merit.

For the foregoing reasons we find that the respondent has not sustained his burden to establish that he is eligible for adjustment of status under section 245 of the Act. Accordingly, we shall dismiss his appeal.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order,

Order to be Reviewed

the respondent is permitted to depart from the United States voluntarily within such time and under such conditions as the District Director may direct; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

Board Member Irving A. Appleman abstained from consideration of this case.

PETITION FOR REVIEW

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

75/4171

GIUSEPPE MARINO (A19 499 685) Petitioner, --against-- IMMIGRATION & NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE, Respondent.	PETITION FOR REVIEW DOCKET NO.....

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your Petitioner, Giuseppe Marino, by his attorney, Thomas A.Church, for his Petition for Review, respectfully shows to this Court and alleges that:

1. The United States Circuit Court of Appeals for the Second Circuit has jurisdiction of this Petition for Review under the provisions of Title 8 U.S.C. Section 1105(a)(2).

2. Your Petitioner resides in the City and State of New York and is within the District of New York.

3. The Respondent maintains an office in the City, County and State of New York, within the jurisdiction of this Court.

4. Your Petitioner is a citizen and native of Italy who last entered the United States on October 4, 1971 as a non-immigrant visitor. As visitor who overstayed his allotted time, he was placed under deportation prodings. The Petitioner subsequently applied for adjustment of status under Section 245 of the Immigration and Nationality Act, 8 U.S.C. 1255, on the basis of a petition filed for him by his brother, a citizen of the United States, as provided for under Section 203(a)(5), 8 U.S.C. 1153(a)(5).

5. Your Petitioner's application for adjustment was denied because

the hearing officer determined he had committed a crime involving moral turpitude prior to his entry and therefore was inadmissible as provided by Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9).

6. It appears from the Board of Immigration Appeals decision that the Petitioner had been convicted on December 6, 1962 in Ribera, Italy for violating Article 642 of the Italian Code, for fraudulently destroying his own property.

7. The Board rendered its decision on April 30, 1975.

8. Your Petitioner has been ordered to surrender for deportation on August 13, 1975.

9. There are a number of discrepancies between the original decision and the appellate decision as rendered by the Board of Immigration Appeals. The questions on appeal were not properly adjudicated, including the relief to which your Petitioner appears to be entitled. In Italy, while his appeal was pending the conviction was extinguished by government amnesty, i.e., by presidential decree.

10. The sole issues involve the alleged conviction of the Petitioner as a possible bar to his seeking the relief, to which he would be ordinarily entitled, and whether these issues were adequately resolved administratively by fact and law.

WHEREFORE, the Petitioner prays for judgment:

(a) For a complete review of the Petitioner's deportation record, including specifically his request for relief;

(b) For a determination in his behalf in accordance with the relief sought, and an Order in connection therewith directing the Board of Immigration Appeals to comply so as to provide the Petitioner with the relief to which he is entitled;

(c) Directing Respondent to stay Petitioner's deportation during the pendancy of this review; and

(d) For such other and further relief as may be appropriate.

Thomas A. Church

THOMAS A CHURCH
Attorney for Petitioner

Dated at New York, New York
this 12th day of August, 1975

EXCERPTS FROM RECORD OF CONVICTION OF POLICE MAGISTRATE COURT OF RIBERA, ITALY & AMNESTY (EXHIBIT 7 & 7A)

* * *

FREE on his own recognizance and PRESENT, the DEFENDANT, accused of the crime under Art. 642 of the Penal Code, of having, in order to obtain for himself the disaster insurance involved, did destroy by means of fire, the roof of a farmhouse owned by Vito Lo Cascio rented by the defendant, in addition to an undetermined number of beehives owned by said defendant.

In the territory of Lucca Sicula on April 27th, 1961.

IN FACT AND IN LAW

By report of June 1, 1961, the Carabineers of Lucca Sicula presented their denunciation to this jurisdiction, without arrest, of Guiseppe Marino, as responsible for the fraudulent distruction of his own property.

They advised that on April 27th, 1961, Giuseppe Marino had voluntarily reported to them that a fire had destroyed the farmhouse owned by Vito Lo Cascio and rented by the defendant, together with the land on which it was located, and that said fire had, besides, destroyed 174 beehives set up in the aforementioned house, causing aggregate damages of approximately 4 million Liras, covered by insurance.

Excerpts from Record

On completing their on-site investigation, the Carabineers verified that the farmhouse rented by Marino had indeed been damaged by the fire which had destroyed the roof, scorched the walls and straw therein; and that on examination of the ashes, they did not encounter any trace of either honey or wax.

With the official appraisal having been completed, it was verified that the damages caused by the fire in question amounted to an aggregate of 250,000 Liras, which sum included 100,000 Liras for the presumed destruction of approximately ten beehives, of which, however, there was no trace.

* * *

In addition, such belief finds full objective corroboration in the appraisal results, as well as in the debosition rendered to the Carabineers by witness Gioacchino Corda, confirmed during the proceedings.

Witness Corda, in fact, stating that he had for approximately 14 years attended to the cultivation of his father's property which bordered on the land rented by the defendant, made precisely clear that, although having frequent contact with Marino, even at lunch-time, on the property where the fire occurred, for approximately three years had never noticed the existence of beehives,

and that Marino had never communicated to him that he possessed any beehives.

The aforementioned witness made clear to exclude (the possibility) that Marino could have possessed such beehives, since otherwise, he would have noticed some trace of same on the property managed by the defendant.

Thereupon, in view of the evidence, there emerged the complete non-existence of the damages claimed by the defendant who by once so doing, had no recourse but to pursue his illicit goal toward realizing a substantial insurance settlement which would permit him satisfactorily to bear the expenses relative to his imminent emigration, at which the defense attorney hinted during proceedings; clear and unequivocable emerges the circumstance that the fire in question, in fulfillment of that deprecated criminal phenomenon which is in ever-increasing vogue in our jurisdiction, was committed solely and exclusively by the defendant.

He therefore is pronounced guilty of the crime of which he is accused, and condemned to a penalty deemed just; i.e., six months of imprisonment and a fine of 100,000 Lira, in addition to trial expenses.

Excerpts from Record

* * *

REPUBLIC OF ITALY

In the name of the Italian People

The Tribunal of Sciacoa, convened in the Council Chamber, and composed of the following magistrates:

1) Dr. Francesco Militello - President
2) Dr. Giuseppe Plaia - Justice
3) Dr. Rosario Messana - Justice

has pronounced the following sentence in the penal case

AGAINST

Giuseppe MARINO, son of the late Lorenzo and of Rosa Bacino, born on January 2nd, 1926, in Lucca Sicula and therein residing at Via Valle #10, and free on his own recognizance.

He is APPEALING the sentence imposed by the Police Magistrate of Ribera on December 6th, 1962, condemning him to six months of imprisonment and a fine of 100,000 Lira, for the crime under Art. 642 C.P. (fraudulent destruction of personal property), sentence suspended for five years, said crime having been committed on April 27th, 1961, in Lucca Sicula.

It is understood that the crime ascribed to the Appellant is included among those foreseen in the Preisdential Decree of

Excerpts from Record

Amnesty of January 24th, 1963, N° 5, for which reason same must be declared extinguished.

In accordance with Articles 151 C.P. and 591 A.P.P., and on request of the Public Ministry, this Court

D E C L A R E S

it unnecessary to proceed in the matter of the aforesaid accused for the above-mentioned crime, by reason of the extinction of said crime following amnesty.

Sciacca, March 8th, 1963.

President - Signed/ Francesco Militello
Justices - Signed/ G. Plaia
/ Rosario Messana

Chancellor - Signed/ G. Bivona

Filed in this Chancellery on this date, March 11th, 1968.
Chancellor - S/ G. Bivona

Entered on April 22nd, 1963,
Chancellor - S/ G. Bivona

Sentence made effective on April 12th, 1963.
Chancellor - S/ G. Bivona

Reviewed by the Public Prosecutor
Signature illegible

A 202 Affidavit of Personal Service of Papers
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

GIUEPPE MARINO,
Petitioner,

- against -

IMMIGRATION & NATURALIZATION SERVICE,
UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.
That on the 29th *day of* Dec. *1975 at* 1) 1 St. Andrews Plaza, New York , New York
2) 1 St. Andrews Plaza, New York, New York

deponent served the annexed Brief and Appendix for Petitioner *upon*
1) Thomas J. Cahill U.S ATTNY FOR THE SOUTHERN DISTRICT
2) Mary Mo gover US.S ATTNY FOR IMMIGRATION
the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 29th
day of December *1975*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele

JAMES A. STEELE